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SUPREME COURT, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 154

CROWN MACHINE & TOOL CO.,
*Petitioner,*

*vs.*

D & S INDUSTRIES, INC. AND KVP-SUTHERLAND PAPER COMPANY,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

ALFRED H. PLYER, JR.,
HOWARD T. MARKEY,
PARKER, CARTER & MARKEY,
8 South Michigan Avenue,
Chicago, Illinois 60603,
*Attorneys for Petitioner.*

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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## Cases Cited.

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D & S INDUSTRIES, INC. AND KVP-SUTHERLAND PAPER COMPANY,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner, Crown Machine & Tool Co., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which held Harrison Patent Nos. 3,125,780 and 3,162,705 invalid and not infringed and Harrison Patent No. 2,951,260 valid but not infringed, and awarded respondent, KVP-Sutherland Paper Company, $35,000.00 in attorneys' fees.

### CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals, the opinion and findings of fact and conclusions of law of the Arizona District Court, and the opinions of the District Court for the Northern District of California, are printed respectively

in Appendices A, B, C and D of this petition, pages A1 through A124 hereof. The opinion of the Court of Appeals is reported at 160 USPQ 584; of the Arizona District Court at 270 F. Supp. 271 (1967); and of the District Court of the Northern District of California at 155 USPQ 309 and 157 USPQ 308.

## JURISDICTION.

The judgment of the Court of Appeals was entered on February 13, 1969; rehearing denied on March 17, 1969.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Review by this Court is discretionary. This petition should be granted under Rule 19 of this Court since the "Court of Appeals * * * has decided a federal question in a way in conflict with applicable decisions of this Court."

## THE QUESTIONS PRESENTED FOR REVIEW.

This is a patent case, and the Court is requested to review the following questions:

1. Where the patent in suit was allowed by the Board of Appeals in the Patent Office after full consideration of a certain reference, may the patent thereafter be invalidated unilaterally by the Court for obviousness under 35 U. S. C. 103 on the same reference—a reference not urged by the defendant.

2. May a patent be held not infringed without applying its claims to the accused structure, as required by *Graver Tank Co.* v. *Linde Air Products Co.*, 339 U. S. 605 (1949).

3. May the patentee be charged with attorneys' fees under 35 U. S. C. 285 for having engaged in "illegal" conduct before the Patent Office where all of the patentee's actions are in full compliance with all Patent Office Rules and the Statutes.

## THE STATUTES INVOLVED IN THIS CASE.

35 U. S. C. 6—*Duties of Commissioner.*

"The Commissioner * * * may * * * establish regulations, not inconsistent with law, for the conduct of proceedings in the Patent Office."

35 U. S. C. 282—*Presumption on Validity; Defenses.*

"A patent shall be presumed valid. * * * The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting it."

35 U. S. C. 285—*Attorney Fees.*

"The court in exceptional cases may award reasonable attorney fees to the prevailing party."

## STATEMENT OF THE CASE AND FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED.

### A. Proceedings Below.

Patent in suit 3,125,780 was granted March 24, 1964, entitled "Apparatus and Method for Making Plastic Containers". Patent in suit 3,162,705 was granted December 22, 1964, entitled "Method for Making Plastic Containers". Action for infringement was instituted in the U. S. District Court for the Northern District of California and on September 26, 1967 both patents were declared invalid and no determination made on infringement of either.

In a companion case in the District Court for the District of Arizona, the same two patents were held not infringed on May 23, 1967.

Appeals were taken in both cases to the Court of Appeals for the Ninth Circuit and the appeals were consolidated. On February 13, 1969, that Court affirmed both District Courts in a per curiam decision.